



Homeland
Security

24 August 2015

Mr. William Erny
Senior Director
American Chemistry Council
700 2nd Street, NE
Washington, DC 20002

Dear Mr. Erny:

The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) has forwarded to the Department of Homeland Security your March 2014 letter regarding the February 2014 Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program Information Collection Request (ICR). We are responding to your letter in concert with OMB's approval of the ICR.

Background--Statutory and Regulatory Framework

In the time since the CFATS Personnel Surety Program ICR was submitted to OMB, the President signed into law the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (the CFATS Act of 2014), Pub. L. No. 113-254, which adds provisions related to CFATS to the Homeland Security Act of 2002, as amended, Pub. L. No. 107-296.¹ The Homeland Security Act of 2002² affirmed that the Department must implement a Personnel Surety Program in which the Department is required to establish a capability for high-risk chemical facilities to comply with Risk-Based Performance Standard (RBPS) 12(iv) of CFATS.³ The CFATS Act of 2014 also established additional provisions for the CFATS Personnel Surety Program, to include allowing a high-risk chemical facility to visually verify certain credentials or documents that are issued by a Federal screening program that periodically vets enrolled individuals against the Terrorist Screening Database (TSDB). Under RBPS 12(iv) high-risk chemical facilities are required to implement security measures to identify individuals with terrorist ties. The approved CFATS Personnel Surety Program ICR aligns with the CFATS regulations and section 2102(d)(2) of the Homeland Security Act of 2002.

¹ Section 2 of the CFATS Act of 2014 adds a new Title XXI to the Homeland Security Act of 2002. Title XXI contains new sections numbered 2101 through 2109. Citations to the Homeland Security Act of 2002 throughout this document reference those sections of Title XXI. In addition to being found in amended versions of the Homeland Security Act of 2002, those sections of Title XXI can also be found in section 2 of the CFATS Act of 2014, or in 6 USC §§ 621 – 629.

² The CFATS Act of 2014 specifically adds Section 2102(d)(2) which requires the Department to implement a Personnel Surety Program.

³ The specific requirement is found at 6 CFR § 27.230(a)(12)(iv).

The CFATS Act of 2014 does not conflict with 6 CFR § 27.230(a)(12)(iv) as promulgated on April 9, 2007 and is consistent with the regulatory text of the CFATS Interim Final Rule (IFR). However, the CFATS Act of 2014 does conflict with IFR preamble because the preamble did not consider visual verification as a means to sufficiently verify an affected individual's enrollment in the Transportation Worker Identification Credential (TWIC) program, Hazardous Materials Endorsement (HME) program, or the Trusted Traveler program. The Department continues to believe that visual verification has significant security limitations. However, as a result of the CFATS Act of 2014, the Department will now accept visual verification of certain credentials or documents as a means to meet RBPS 12(iv).

It bears noting that the burden estimates of the ICR have not changed as a result of the CFATS Act of 2014 or as a result of any programmatic changes to the CFATS Personnel Surety Program. Therefore, the Department has the authority to implement the CFATS Personnel Surety Program as described in the CFATS IFR with modifications to account for new statutory requirements in the CFATS Act of 2014.

Multiple Options for Compliance with RBPS12(iv)

As mentioned above, in view of the Personnel-Surety-focused language of the CFATS Act of 2014, the Department will accept visual verification as a method to comply with RBPS 12(iv). Thus, in addition to the three options for complying with RBPS 12(iv) described in the 30-day Paperwork Reduction Act (PRA) notice,⁴ the Department is making available a fourth option for high-risk chemical facilities to comply with RBPS 12(iv): Option 4 – *Visual Verification Of Credentials Conducting Periodic Vetting*. Option 4 will allow a high-risk chemical facility to satisfy its obligation under 6 CFR § 27.230(a)(12)(iv) to identify individuals with terrorist ties using any Federal screening program that periodically vets individuals against the TSDB if:

- The Federal screening program issues a credential or document;
- The high-risk chemical facility is presented a credential or document by the affected individual; and
- The high-risk chemical facility verifies that the credential or document is current in accordance with its Site Security Plan (SSP).

As noted previously, however, visual verification of existing credentials carries with it inherent security limitations and provides less security value than the other options available under the CFATS Personnel Surety Program because a visual inspection of a credential alone cannot necessarily confirm whether a credential is expired, revoked, fraudulent or otherwise not valid. For example:

- The visual verification of a TWIC will not reveal if the TWIC has been revoked by the Transportation Security Administration (TSA); and
- The visual verification of an HME on a commercial driver's license will not reveal if the endorsement has expired or been revoked.

⁴ The 30-day Federal Register notice that solicited comment about the CFATS Personnel Surety Program ICR may be viewed at <https://federalregister.gov/a/2014-02082>.

High-risk chemical facilities are encouraged to review all the available options and carefully consider which option (or combination of options) best addresses their specific security situation. In addition to the options described in the 30-day notice and in this letter, high-risk chemical facilities are welcome to propose in their SSPs or Alternative Security Programs (ASP) options not described in this document. The Department will assess the adequacy of such alternative or supplemental options on a facility-by-facility basis.

Specific Questions Raised by American Chemistry Council (ACC)

Having taken note of the changed landscape and additional options afforded by the CFATS Act of 2014 and noting that your letter to OMB was drafted several months prior to enactment of this significant piece of legislation, the Department would like to take this opportunity to address the specific questions and concerns you raised in your March 2014 letter.

- (1) ACC suggested that the Department “clarify the parameters of acceptable technology that is periodically updated using the Cancelled Card List (CCL) to vet personnel that hold TWIC Cards.” ACC also suggests that “facilities could greatly benefit by using the CCL[.]”**

There are a number of innovative products and solutions being made available in the private sector with regard to the use of the CCL or the Certificate Revocation List (CRL). The Department is willing on a case by case basis to discuss with a high-risk chemical facility any specific solution it would like to propose in its SSP to meet one or more of the background check requirements of RBPS 12.

- (2) ACC suggested that the Department “provide a voluntary option for Tier 3 and Tier 4 facilities to submit PII on their affected individuals to DHS for TSDB vetting[.]”**

The Department appreciates ACC’s forward leaning recommendation regarding accepting information about affected individuals from Tier 3 and Tier 4 facilities that voluntarily want to submit the information upon approval of the ICR. The Department considered ACC’s proposal, however, and the recommendation would dramatically increase the burden in the ICR submitted to OMB. Such an increase in the burden and change to the scope of the program would likely require the Department to withdraw the ICR and publish additional notices pursuant to the Paperwork Reduction Act. These additional notices would delay implementation of the program at Tier 1 and Tier 2 high-risk chemical facilities. The Department strongly believes that implementation of the CFATS Personnel Surety Program as soon as possible at Tier 1 and Tier 2 is an important step towards closing the existing security gap in the CFATS program. The Department intends to incorporate lessons learned from program implementation for Tier 1 and Tier 2 facilities into a new ICR that will be initiated to extend the CFATS Personnel Surety Program to include Tier 3 and Tier 4 facilities.

- (3) ACC suggested that the Department “improve the transparency of the vetting process and ensure that affected individuals are cleared prior to be[ing] granted**

access to restricted areas and critical assets and develop a protocol for notifying the facility in the event of a positive match[.]”

In the event of a positive match against the TSDB and in order to prevent a significant threat to a high-risk chemical facility or loss of life, a high-risk chemical facility will be contacted where appropriate and in accordance with federal law and policy, as well as law enforcement and intelligence requirements. This policy is consistent with other Federal security vetting programs and is consistent with RBPS 12.

(4) ACC suggests that the Department “should expand the TWIC program to the CFATS community[.]”

The National Protection and Programs Directorate (NPPD) has provided ACC’s comment on this issue to TSA.

(5) ACC suggests that the Department “should establish a secure website for affected individuals to submit their Personally Identifiable Information (PII) directly to DHS.”

Through the PRA, the Department has not sought to expand or change the 6 CFR Part 27. The proposal contained in the ACC’s March 4, 2014 letter would at a minimum require rulemaking activities and/or statutory changes. The CFATS Personnel Surety Program is different from many other vetting programs due to the fact that individuals do not directly provide information about themselves in order to receive a status, benefit, or credential. This framework, however, aligns with the CFATS program generally in that CFATS does not create a relationship directly between individuals and the Department. Rather, CFATS regulated high-risk chemical facilities and the SSP developed by these facilities to account for the various Risk-Based Performance Standards - to include RBPS 12 - becomes, in essence, a contract between the high-risk facility and the Department.

The Department recently initiated new rulemaking activities for CFATS generally, and intends to use the rulemaking process (not the PRA process) to make any future changes to the rule. In response to the Department’s solicitation of comment as part of a CFATS Advance Notice of Proposed Rulemaking on August 18, 2014, ACC submitted comments. The Department will review and consider ACC’s comments to amend 6 CFR Part 27 (and RBPS 12 in particular) as part of future rulemaking efforts.

You and ACC have been leaders in the personnel surety arena and in furthering the overall objectives of the CFATS program, and the Department is appreciative of your continuing efforts to secure America's highest-risk chemical facilities - an effort that is essential to the Nation's critical infrastructure security and resilience.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Wulf', with a long horizontal stroke extending to the right.

David M. Wulf
Director
Infrastructure Security Compliance Division